

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA

VS.

3:13-CR-00012-03-BRW

JERROD NICHOLS SMITH

ORDER

In August 2017, the jury trial in this case was continued because Defendant’s lawyer, Mr. Kendrick, broke his hip.¹ On November 20, 2017, eight days before trial, Defendant filed a motion for a continuance, asserting that his lawyer needed additional time to prepare for trial.² The motion was denied on November 21, 2017.³ Just over five hours later, Defendant filed a Motion to Continue because his lawyer had pneumonia.⁴ The motion was granted.⁵

On November 22, 2017, I raised the issue of the need for back-up counsel in this case. Mr. Kendrick indicated that he “would welcome co-counsel” after “giving thought to the effect of [his] age and apparently declining health may have on [his] client and [his] ability to properly represent him in the upcoming trial.”⁶ He added that he would “of course, cooperate fully with co-counsel if [I were to] appoint one.”⁷

¹Doc. Nos. 329, 330, 331.

²Doc. No. 350.

³Doc. No. 352.

⁴Doc. No. 353.

⁵Doc. No. 354.

⁶See attached emails.

⁷*Id.*

In response to Mr. Kendrick's email, I notified the parties that I had retained a back-up judge in case I was unavailable for the February 2018 trial. The Prosecution assured me that it too had back-up. However, when I suggested again that Mr. Kendrick or his client retain back-up counsel, Mr. Kendrick responded with the following:

I have discussed your indication of intent with my client. In addition, I have sought personal legal counsel since you do indicate intent to take action against me personally.

My client continues to maintain, as I have stated before, that he does not have the financial ability to employ additional counsel. I also asked him if he was satisfied with me as his counsel and he stated that he was.

Your Honor, I don't know whether it is proper for me so say or not, but I would show the court that if my client has resources, I would seek to have them apply to the sizeable balance which he owes me.

I also show the court that any attempt to charge me with payment for my client's co-counsel will have a number of negative effects, among which are:

1. It would constitute an unlawful taking of my property and
2. It would create a conflict of interest between me and my client.

In any event, I continue to announce ready for trial on February 20, 2018.⁸

On December 19, 2017, I directed Mr. Kendrick to have his client fill out an *in forma pauperis* form so that I could appoint back-up counsel. Two weeks later, when no *in forma pauperis* application had been filed, I followed up with Mr. Kendrick. He responded:

My client stated that he did not believe that a lawyer new to the case could become adequately prepared to represent him at trial by February 20.

I had to agree with him.

He then stated that he did not want to request the appointment of additional counsel.⁹

⁸See attachment.

⁹*Id.*

“The purpose of the Speedy Trial Act is not only to protect a defendant’s constitutional right to a speedy trial, but also to serve the public interest in bringing prompt criminal proceedings.”¹⁰ The Indictment was filed on January 17, 2013. Before August 2017, Defendant had filed or joined in nine previous motions to continue. The two most recent continuances that were granted (one request was denied) were based on Mr. Kendrick’s health issues. To date, there have been eleven continuances and a nearly five year delay. There will be no more continuances.

The issue of Defendant obtaining co-counsel has been discussed since November 22, 2017. Now Defendant contends that co-counsel would not have adequate time to prepare. I am unimpressed with the suggestion that seven weeks (or twelve weeks, if counsel had been obtained when I first suggested it) is insufficient time for a lawyer to be ready to try this case. Defendant rejected my suggestion in November that he hire back-up counsel and has refused to fill out an *in forma pauperis* form so that co-counsel could be appointed and ready for trial on February 20, 2018. The delay has gone on long enough.

That said, Defendant is officially on notice that if he does not obtain back-up counsel for the February 20, 2018 trial, and Mr. Kendrick is unable to represent him at trial, then he will be required to proceed as an unrepresented person (*pro se* as lawyers and judges put it). Again, the right to a speedy trial is important for the public.

IT IS SO ORDERED this 3rd day of January, 2018.

/s/ Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

¹⁰*United States v. Moss*, 217 F.3d 426, 432 (6th Cir. 2000).



RE: FW: USA v. Edwards et al, 3:13-cr-00012

Thomas W. Kendrick to: matt_morgan
Cc: "Leventis, Henry \(\USATNM\)", stoussaint

12/04/2017 09:52 AM

From: "Thomas W. Kendrick" <tomk@kendricklaw.com>
To: <matt_morgan@ared.uscourts.gov>
Cc: "Leventis, Henry \(\USATNM\)" <Henry.Leventis2@usdoj.gov>, <stoussaint@usa.doj.gov>

History: This message has been forwarded.

Your honor: I apologize for misunderstanding your e-mail regarding the government selecting additional counsel. I have conferred with my client concerning employment of additional counsel. He states that he is unable financially to employ additional counsel. My experience with him in that regard affirms that statement.

Thank you.

Tom Kendrick

From: matt_morgan@ared.uscourts.gov [mailto:matt_morgan@ared.uscourts.gov]
Sent: Monday, December 04, 2017 9:34 AM
To: Thomas W. Kendrick; Stephanie.Toussaint@usdoj.gov; Henry.Leventis2@usdoj.gov
Subject: RE: FW: USA v. Edwards et al, 3:13-cr-00012

Mr. Kendrick:

I was confirming that the United States has at least two lawyers prepared for trial as well. They said they do.

Again, have you retained back-up counsel yet?

If not, what are your plans? This should be done forthwith.

Please respond forthwith.

Cordially,

B.R. Wilson

From: "Thomas W. Kendrick" <tomk@kendricklaw.com>
To: <matt_morgan@ared.uscourts.gov>
Date: 12/04/2017 09:08 AM
Subject: RE: FW: USA v. Edwards et al, 3:13-cr-00012

Your Honor: I respectfully submit that a trial at which defendant is represented by standby counsel selected and prepared by the government would not give the appearance of an adversarial proceeding in which the defendant's rights were properly protected.

If the defendant is represented by stand by counsel at trial, that counsel should be selected by the court and act independently of the United States Attorney's office.

I do plan to be at trial and represent my client. I do, however, understand the court's concern.

Thank you.

Tom Kendrick

From: matt_morgan@ared.uscourts.gov [mailto:matt_morgan@ared.uscourts.gov]
Sent: Friday, December 01, 2017 3:12 PM
To: Leventis, Henry (USATNM); Toussaint, Stephanie (USATNM)
Cc: Thomas W. Kendrick
Subject: RE: FW: USA v. Edwards et al, 3:13-cr-00012

Dear Counsel:

I assume that the US Attorney's office will have at least two lawyers fully prepared to try the case if lead counsel happens to be unable to perform this task.

Please advise me by noon, Monday, December 4, 2017.

Cordially,

B.R. Wilson

From: "Leventis, Henry (USATNM)" <Henry.Leventis2@usdoj.gov>
To: "Thomas W. Kendrick" <tomk@kendricklaw.com>, "matt_morgan@ared.uscourts.gov" <matt_morgan@ared.uscourts.gov>
Cc: "Toussaint, Stephanie (USATNM)" <Stephanie.Toussaint@usdoj.gov>
Date: 12/01/2017 11:58 AM
Subject: RE: FW: USA v. Edwards et al, 3:13-cr-00012

Judge Wilson,

We would respectfully note to the Court that defense counsel's email does not respond to the Court's question of immediately retaining back-up counsel who has the time between now and trial to adequately prepare and be ready to try this case. Further, defense counsel's response leaves open the obvious possibility of him having to delay the trial again due to new health related issues.

For these reasons, we respectfully ask that he be ordered to retain back up counsel immediately or that back up counsel be appointed by the Court if the defendant cannot afford it.

Best regards,
Henry Leventis

From: Thomas W. Kendrick [<mailto:tomk@kendricklaw.com>]
Sent: Friday, December 01, 2017 8:07 AM
To: matt_morgan@ared.uscourts.gov
Cc: Leventis, Henry (USATNM) <hleventis@usa.doj.gov>; Toussaint, Stephanie (USATNM) <stoussaint@usa.doj.gov>
>
Subject: RE: FW: USA v. Edwards et al, 3:13-cr-00012

I have met with my doctor. The pneumonia is clearing and I should be completely free of it in about a week. After that, I will need a week to get back to full strength. He thinks I should be O.K. to trial February 20. I agree that I am feeling better. No more elevated temperature and the coughing has ceased. He says my chances for February 20 is about as good as anybody elses.

With best wishes to you all.

Tom Kendrick

From: matt_morgan@ared.uscourts.gov [mailto:matt_morgan@ared.uscourts.gov]
Sent: Monday, November 27, 2017 10:36 AM
To: Thomas W. Kendrick; Henry.Leventis2@usdoj.gov; stoussaint@usa.doj.gov
Subject: Re: FW: USA v. Edwards et al, 3:13-cr-00012

Dear Counsel

Judge Hugh Lawson of the Middle District of Georgia has my back for the trial that is set to commence on Tuesday, February 20, 2018.

I am inclined to think that defense counsel and/or defendant should forthwith retain a back-up counsel who would be fully ready to take this case to trial if Mr. Kendrick is not able to participate. Counsel for both parties should respond to this suggestion by noon (cst), this Friday, December 1, 2018

Cordially,

B.R. Wilson

From: "Thomas W. Kendrick" <tomk@kendricklaw.com>
To: "Matt Morgan" <matt_morgan@ared.uscourts.gov>
Cc: "Leventis, Henry (USATNM)" <Henry.Leventis2@usdoj.gov>
Date: 11/23/2017 09:49 PM
Subject: FW: USA v. Edwards et al, 3:13-cr-00012

From: Thomas W. Kendrick [<mailto:tomk@kendricklaw.com>]
Sent: Thursday, November 23, 2017 9:46 PM
To: 'Leventis, Henry (USATNM)'
Subject: RE: USA v. Edwards et al, 3:13-cr-00012

Judge Wilson: I do not agree that the age of the case and the number of continuances (some of which were not of the defendant's doing) are determinative considerations for the appointment of co-counsel. Each continuance was granted based upon proper consideration by the court. Government was providing discovery up until just a few months ago.

However, for some time now, I have been giving thought to the effect my age and apparently declining health may have on my client and my ability to properly represent him in the upcoming trial. I thought I was carrying my age very well but things do change gradually. It is with this in mind that I tell you I would welcome co-counsel. I will, of course, cooperate fully with co-counsel, if you appoint one.

Yours truly,
Thomas Kendrick

From: Leventis, Henry (USATNM) [<mailto:Henry.Leventis2@usdoj.gov>]
Sent: Wednesday, November 22, 2017 10:25 AM
To: matt_morgan@ared.uscourts.gov; Toussaint, Stephanie (USATNM)
Cc: TomK@Kendricklaw.com; Ann_G_Frantz@tnmd.uscourts.gov
Subject: RE: USA v. Edwards et al, 3:13-cr-00012

Judge Wilson,
We are available to try the case as soon as possible, including February 19, 2018. We agree that it is necessary to appoint co-counsel in this matter, given the age of the case and the number of continuances. We respectfully request that the Court identify co-counsel who indicates that he or she is able to focus on this matter between now and 2/19, so that no further continuances are requested. We also appreciate the Court's effort to get a back-up judge.

Best regards,
Henry Leventis

From: matt_morgan@ared.uscourts.gov [mailto:matt_morgan@ared.uscourts.gov]
Sent: Wednesday, November 22, 2017 9:54 AM
To: Leventis, Henry (USATNM) <hleventis@usa.doj.gov>; Toussaint, Stephanie (USATNM) <stoussaint@usa.doj.gov>
>
Cc: TomK@Kendricklaw.com; Ann_G_Frantz@tnmd.uscourts.gov
Subject: USA v. Edwards et al, 3:13-cr-00012

Dear Counsel:

In view of the physician's notes, which were attached to defense counsel's motion for a continuance, I am of the opinion that the case must be continued, as much as I hate to continue it again.

I anticipate entering an order today resetting this case for Monday, February 19, 2018.

Also, in view of Mr. Kendrick's health issues, I anticipate appointing co-counsel to be on full standby.

This case, obviously, needs to be tried -- it is overdue now -- and I may see if I can get another judge to back me up in case I run into a ditch.

Please respond to this email by return email.

Cordially,

B.R. Wilson

USA v. Edwards et al, 3:13-cr-00012

Bruce C. Davis to: tomk

12/11/2017 02:43 PM

Cc: Joe B Brown, Hugh Lawson, stephanie.toussaint, henry.leventis2, Melanie Beard,
Matt Morgan

From: Bruce C. Davis/ARED/08/USCOURTS

To: tomk@kendricklaw.com

Cc: Joe B Brown/TNMD/06/USCOURTS@USCOURTS, Hugh
Lawson/GAMD/11/USCOURTS@USCOURTS, stephanie.toussaint@usdoj.gov,
henry.leventis2@usdoj.gov, Melanie Beard/ARED/08/USCOURTS@USCOURTS, Matt

Dear Mr. Kendrick:

I am very pleased that you are doing well, and I trust that you will continue to do so for the foreseeable future.

At the same time, however, I have lined up a backup judge who can preside if, for some reason I cannot do it. Likewise, the U.S. Attorney's Office has two Assistant U.S. Attorneys, both of whom can try the case alone if the other can't do it.

I want you, or your client, to forthwith retain another lawyer who will be fully prepared and ready to try the case if, for some reason you can't do it (either before or during the trial).

If you and your client are not willing to do this, I will secure a backup counsel for you and, if I have the authority, I will direct you or your client (or both) to pay the backup lawyer.

Please advise me by noon CST on Wednesday, December 13, 2017, whether you are willing to do this.

Thank you.

Cordially,

Billy Roy Wilson



USA v. Smith 3:13-cr-00012

Thomas W. Kendrick to: matt_morgan
Cc: "Leventis, Henry \(\USATNM\)", Bruce_Davis

01/02/2018 03:02 PM

From: "Thomas W. Kendrick" <tomk@kendricklaw.com>
To: <matt_morgan@ared.uscourts.gov>
Cc: "Leventis, Henry \(\USATNM\)" <Henry.Leventis2@usdoj.gov>, <Bruce_Davis@ared.uscourts.gov>

History: This message has been forwarded.

Judge Wilson: I did access CJA Form 23 and send it to my client. He did notice the language indicating that it was in support of request for attorney.

He asked me questions such as what the function of an appointed lawyer would be and I told him that you wanted one available in case I could not perform at trial.

He asked if this was routinely done. I told him that I did not know what your standard procedure was but that in my experience it was not.

He asked how the appointed attorney would be prepared and given all the information he would need.

I told him that I couldn't really answer that because I did not know what your instructions in that regard would be.

My client stated that he did not believe that a lawyer new to the case could become adequately prepared to represent him at trial by February 20.

I had to agree with him.

He then stated that he did not want to request the appointment of additional counsel.

Yours truly,

Thomas Kendrick

From: matt_morgan@ared.uscourts.gov [mailto:matt_morgan@ared.uscourts.gov]
Sent: Tuesday, January 02, 2018 9:30 AM
To: tomk@kendricklaw.com
Cc: Bruce_Davis@ared.uscourts.gov; Leventis, Henry (USATNM)
Subject: Fw:

Dear Mr. Kendrick:

What is the status on this issue? I do not see that an *in forma pauperis* application has been filed, but I may have overlooked it.

Please advise forthwith.

B.R. Wilson

----- Forwarded by Matt Morgan/ARED/08/USCOURTS on 01/02/2018 09:28 AM -----

From: Matt Morgan/ARED/08/USCOURTS
To: "Thomas W. Kendrick" <tomk@kendricklaw.com>
Cc: Bruce_Davis@ared.uscourts.gov, "Leventis, Henry \ (USATNM)" <Henry.Leventis2@usdoj.gov>
Date: 12/19/2017 10:42 AM
Subject: Re:

Dear Mr. Kendrick:

Please forthwith have your client fill out an *in forma pauperis* form so I can appoint back-up counsel.

Cordially,

B.R. Wilson

From: "Thomas W. Kendrick" <tomk@kendricklaw.com>
To: <Bruce_Davis@ared.uscourts.gov>
Cc: "Matt Morgan" <matt_morgan@ared.uscourts.gov>, "Leventis, Henry \ (USATNM)" <Henry.Leventis2@usdoj.gov>
Date: 12/13/2017 11:22 AM
Subject:

Dear Judge Wilson:

This is in reply to yours of 12/11/2017 which apparently was sent through Mr. Davis.

I have discussed your indication of intent with my client. In addition, I have sought personal legal counsel since you do indicate intent to take action against me personally.

My client continues to maintain, as I have stated before, that he does not have the financial ability to employ additional counsel. I also asked him if he was satisfied with me as his counsel and he stated that he was.

Your Honor, I don't know whether it is proper for me so say or not, but I would show the court that if my client has resources, I would seek to have them apply to the sizeable balance which he owes me.

I also show the court that any attempt to charge me with payment for my client's co-counsel will have a number of negative effects, among which are:

1. It would constitute an unlawful taking of my property and
2. It would create a conflict of interest between me and my client.

In any event, I continue to announce ready for trial on February 20, 2018.

Respectfully submitted

Thomas Kendrick